

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>HOWARD WHITE</b>	:	
<b>Petitioner</b>	:	<b>CIVIL ACTION</b>
	:	<b>NO. 02-767</b>
<b>v.</b>	:	
	:	
<b>DONALD T. VAUGHN, et al.,</b>	:	
<b>Respondents</b>	:	

**MEMORANDUM OPINION AND ORDER**

**RUFE, J.**

**January 9, 2004**

Before the Court are Respondents' Amended Objections to the September 2, 2003 Report and Recommendation ("R & R") of Magistrate Judge Arnold C. Rapoport in the above-captioned case. In these amended objections, Respondents notified this Court for the first time that on January 9, 2003, Petitioner appealed the PCRA Court decision dismissing his case. When Judge Rapoport issued his September 2, 2003 R & R, he was unaware of this crucial fact, and, pursuant to this Court's July 29, 2003 Order, reviewed each of Petitioner's claims for relief on their merits. Had Judge Rapoport known about Petitioner's appeal, the Court is certain that in his September 2, 2003 R & R, he would have reiterated the recommendation he made in his June 6, 2003 R & R, where he recommended that the petition be dismissed without prejudice for lack of complete exhaustion under Rose v. Lundy, 455 U.S. 509, 522 (1982). This Court, finally having all of the relevant facts before it, agrees with Judge Rapoport's June 6, 2003 recommendation and dismisses the petition without prejudice.

**DISCUSSION**

On April 11, 1996, Petitioner filed the first of two pro se petitions under the Post-Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. §§ 9541-46. In this petition, Petitioner

requested relief based on one claim – that Commonwealth witness Charles Atwell was supplied sexual favors in exchange for his alleged false eyewitness testimony implicating Petitioner (the “sexual favors claim”). The PCRA Court rejected this claim, and the Pennsylvania Superior Court affirmed on August 11, 2000. Commonwealth v. White, 764 A.2d 1131 (Pa. Super. 2000). The Pennsylvania Supreme Court denied allocatur. Commonwealth v. White, 771 A.2d 1284 (Pa. 2001).

Petitioner filed the instant pro se Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on February 13, 2002, advancing the sexual favors claim and four additional claims for relief not raised in the aforementioned PCRA proceedings. Approximately two days later, on February 15, 2002, Petitioner filed a second PCRA petition advancing these four additional claims. On December 9, 2002, the PCRA Court dismissed this second PCRA Petition as untimely. Petitioner filed a Notice of Appeal of this dismissal on January 9, 2003.

On June 6, 2003, Judge Rapoport, without knowledge of the December 9, 2002 PCRA Court dismissal or of Petitioner’s appeal, recommended that Petitioner’s pro se Petition for Writ of Habeas Corpus be denied and dismissed without prejudice as a mixed petition in accordance with Rose v. Lundy, 455 U.S. 509, 522 (1982). On June 20, 2003, Respondents, with knowledge of the PCRA Court dismissal but not of Petitioner’s appeal, objected to this recommendation and argued that because the second PCRA petition had been dismissed as untimely and no appeal had been filed, Judge Rapoport’s recommendation that the petition be dismissed on exhaustion grounds was improper. On July 29, 2003, this Court did not approve Judge Rapoport’s R & R and remanded to Judge Rapoport for consideration on the merits of the sexual favors claim, which had been exhausted, and of the four procedurally defaulted claims where cause and prejudice or a fundamental miscarriage of justice could be established.

On September 2, 2003, Judge Rapoport, without knowledge of Petitioner's appeal, issued a second R & R that the petition should be denied without prejudice. Judge Rapoport rejected Petitioner's sexual favors claim on the merits and found Petitioner's other claims procedurally defaulted because Petitioner had not shown that failure to consider the claims would result in a fundamental miscarriage of justice. R & R at 8-13.

On September 12, 2003, Respondents objected to this second R & R on the sole ground that it recommended that the petition be denied and dismissed without prejudice. On September 24, 2003, Respondents received a copy of Petitioner's letter to the Clerk of Court [Doc. #22], in which Petitioner stated that on January 9, 2003, he had filed an appeal of the second PCRA Court order dismissing his petition as untimely. When Respondents filed their June 20, 2003 objections to the first R & R and their September 12, 2003 objections to the second R & R, they were unaware Petitioner had filed this appeal.<sup>1</sup>

On September 25, 2003, after discovering that Petitioner had appealed the second PCRA Court dismissal, Respondents filed amended objections to the September 2, 2003 R & R. In these amended objections, Respondents conceded that Judge Rapoport's initial recommendation that the petition be dismissed for lack of complete exhaustion was correct and should be adopted.

After consideration of the aforementioned circumstances, and because there are no longer any objections to Judge Rapoport's June 6, 2003 recommendation, the Court dismisses the petition without prejudice for failure to exhaust state remedies.

An appropriate Order follows.

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<sup>1</sup> For some reason, Petitioner's appeal was not docketed in the Pennsylvania Superior Court until August 18, 2003, and when counsel for Respondents contacted the Superior Court prior to filing Respondents' objections to the June 6, 2003 R & R, they were advised that no appeal had been filed.

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**CIVIL ACTION**

**No. 02-767**

**ORDER**

**AND NOW**, this 9th day of January, 2004, upon careful consideration of the pleadings and record, and after review of the June 6, 2003 Report and Recommendation of United States Magistrate Judge Arnold C. Rapoport [Doc. #16] and Respondents' Objections thereto [Doc. #17], Judge Rapoport's September 2, 2003 Report and Recommendation [Doc. #20] and Respondents' Amended Objections thereto [Doc. #23], and for the reasons set forth in the attached Memorandum Opinion, it is hereby **ORDERED**:

1. Respondents' Amended Objections [Doc. #23] are **SUSTAINED**;
2. The September 2, 2003 Report and Recommendation is **NOT APPROVED**;
3. The Petition for Writ of Habeas Corpus is **DENIED** and **DISMISSED WITHOUT PREJUDICE** for failure to exhaust state remedies. Petitioner may file another petition presenting only his exhausted claims with the warning that, if he chooses to file another petition, he may be unable to present any further claims in this Court because successive petitions require the Third Circuit's permission for filing; and
4. The Clerk of Court shall mark this case closed for administrative purposes.

It is so **ORDERED**.

**BY THE COURT:**

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**CYNTHIA M. RUFÉ**